

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation of the
Family Child Care License of
Patricia Salisbury

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for Hearing before Administrative Law Judge Steve M. Mihalchick on January 16, 2004, at Douglas County Social Services, 1073 Conference Room, 809 Elm Street, Suite 1146, Alexandria, MN. The hearing record closed at the conclusion of the hearing.

Daniel C. Lee, Assistant Douglas County Attorney, 305 Eighth Avenue West, Alexandria, MN 56308, appeared for Douglas County Social Services (DCSS) and the Department of Human Services ("the Department").

John G.E. Thompson, Staff Attorney, Legal Services for Northwest Minnesota, 1114 Broadway, Alexandria, MN 56387, appeared for Patricia Salisbury (Licensee).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUE

Whether sanctions should be imposed upon the family child care license of Licensee based upon her failure to provide access to the minor members of her household during a child protection and child care licensing investigation?

Based upon the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Licensee is a resident of Douglas County, licensed as a Family Child Care Provider since 1999.^[1] She provides daycare at her residence in Alexandria, MN. Licensee's family consists of her husband David, and their two children, I.S., age 11, and Z.S., age 7.^[2] For licensing capacity purposes, Z.S. is considered a daycare child during daycare hours, due to his age.^[3]

2. On August 25, 2003, DCSS received a report regarding a lack of supervision of Licensee's two children and some of her daycare children.^[4] Specifically, the reporter alleged that Z.S. had been lying in the road the previous weekend; Z.S. rode his bike in the road frequently and intentionally blocked the way of cars; the daycare children tease the neighbor's dog; the daycare children yell and swear at people; I.S., within the last year or two, picked up an 18-month old daycare child and threw the child face down in a sand pile; and Licensee's children or daycare children hung a doll by the neck in a tree in Licensee's yard.^[5]

3. Upon receiving the report, DCSS decided that Nancy Wiebe of the Child Protection Unit and Barbara Kleinschmidt of the Licensing Unit would handle the matter jointly, pursuant to Minn. Stat. § 626.556. The two DCSS workers immediately followed up with the reporter via telephone, who clarified the allegations and stated that Z.S. was unsupervised a couple of times each week.^[6]

4. On August 26, 2003, DCSS received a second report. This time it was alleged that Z.S. was swimming in Licensee's backyard pool, that a daycare child, approximately four years old, was leaning over the edge of the pool and that no adult was present. The reporter called the police, who went to Licensee's home and found Licensee outside with the children and able to intervene if necessary.^[7]

5. That same day, during daycare hours, Ms. Wiebe and Ms. Kleinschmidt visited Licensee's home.^[8] When Licensee answered the door, Ms. Wiebe explained that they were there to follow-up on a report they had received regarding child

protection issues and daycare issues. Licensee asked if the visit was related to the police stopping by her house, and Ms. Kleinschmidt replied that that was part of the reason for the visit. When Licensee questioned them further about the nature of the allegations, Ms. Wiebe said that she could not divulge that information, and that they needed to speak with I.S. and Z.S. The two workers asked for a room or bedroom in which to interview Z.S., but Licensee refused to let them use a bedroom and offered the dining room, which was not private. During this conversation, Ms. Kleinschmidt noticed that the stairway to Licensee's basement appeared cluttered.^[9] Ms. Wiebe and Ms. Kleinschmidt suggested they take Z.S. outside for an interview and Licensee agreed. When the two workers asked if Z.S. knew why they wanted to talk with him, he pointed at a neighbor's house and said, "They called on us."^[10] During this time, Licensee's husband returned home with I.S. Approximately five minutes into the interview, in the middle of questioning Z.S. about the pool incident, Licensee brought I.S. outside and stated that the workers could question him now. One of the workers explained that they were not quite finished with Z.S. and that they would come inside to get I.S. when they were done. Licensee went back into the house with I.S., and shortly thereafter, Licensee's husband came outside with I.S. Ms. Wiebe explained that they were investigating a concern regarding lack of supervision and that standard procedure required them to interview the children alone, and then talk with the parents. If such procedures were not followed, other means of getting the needed information would have to be pursued. Licensee's husband refused to let the interview proceed and began to get angry. As the two workers were leaving, Licensee approached them at their car, and after they explained what had occurred, Licensee said that her husband had a tendency to be paranoid. The workers cautioned Licensee that a failure to follow the investigative procedure could affect her daycare license. Licensee responded, "I know." The two workers asked Licensee to talk with her husband and let them know if they would cooperate or not. At that point, Licensee's husband came back outside and interrupted the conversation. As the daycare children were not supervised at that moment, the workers advised Licensee and her husband to go back inside the house. Within a minute, Licensee came back outside, with her husband behind her. He continued to interrupt, and in the interests of the unsupervised children inside the house, Ms. Wiebe and Ms. Kleinschmidt left.

6. On August 28, 2003, Ms. Wiebe and Ms. Kleinschmidt received feedback from Assistant County Attorney Dan Lee and their DCSS supervisor about whether or not there were grounds to revoke or immediately suspend the license; both individuals recommended revocation of the license.

7. When Ms. Kleinschmidt had not heard from Licensee since the meeting at the house, she called Licensee on August 28, 2003, to inquire as to whether Licensee and her husband would cooperate with the investigation. Licensee said that she was very stressed about the whole ordeal and that she did not know what to do. Licensee's husband picked up another phone extension in the house and interrupted, stating, "The report is false." Ms. Kleinschmidt attempted to explain that the investigation involved more than just the swimming pool incident, and Licensee's husband was very short with her. He refused to come to the agency to discuss the investigation and finally ordered Licensee to hang up the phone. Licensee began crying. Ms. Kleinschmidt again

cautioned Licensee that her daycare license would be affected by any refusal to cooperate with the investigation. Again, Licensee said, "I know."

8. On August 29, 2003, Ms. Kleinschmidt drafted a letter to the Department recommending revocation of the license. She also communicated her intent to the Department over the phone.

9. That same day, Licensee called Ms. Kleinschmidt and permitted her and Ms. Wiebe to interview I.S., but not Z.S. When Ms. Kleinschmidt explained that the interview with Z.S. was not complete, Licensee responded that her husband would not allow them to interview Z.S. because of his young age. Ms. Kleinschmidt cautioned Licensee a third time about the negative effect this could have on her daycare license.

10. On September 3, 2003, Ms. Wiebe interviewed Z.S. at his school.^[11] She asked Z.S. about riding his bike in the road. He indicated that he generally rode his bike in the street in front of Licensee's house in the evening when the traffic was light. He also commented that the house is located on a dead-end road. Z.S. denied playing in the road. The next day, Ms. Wiebe interviewed I.S. When asked if his brother gets too close to passing cars, I.S. said, "He usually watches." And he commented that Z.S. does not play in the road. Both boys indicated that their father would sometimes get mad and swear.

11. Ms. Wiebe and Ms. Kleinschmidt interviewed Licensee at DCSS on September 4, 2003. Ms. Wiebe questioned Licensee about the child protection concerns, including swearing in front of her children, supervision of Z.S., the allegation that Z.S. was lying in the road in front of Licensee's house, and her children taunting the neighbor's dog. Ms. Kleinschmidt then addressed her licensing concerns, including outdoor supervision, diapering in the garage, pool supervision and guidelines, the daycare children teasing the neighbor's dog, I.S. picking up a 18-month old child and throwing the child facedown into a sand pile, the doll hanging from a tree in the backyard, indoor supervision, medications in the house, the condition of the house and garage, and Licensee's failure to provide access to her house and to allow interviews with Z.S. and I.S. Ms. Kleinschmidt stated that due to the concerns about the house and garage, she and Ms. Wiebe needed to visit Licensee's house that day. Licensee replied, "This will be a problem," and said that her husband would not allow the two workers into the home. Licensee did not offer access to her home and garage. Ms. Kleinschmidt explained, again, that failure to provide access to the home is grounds for a recommendation of revocation and that Licensee is held to a higher standard because she possesses a daycare license. Licensee then became highly emotional, and stated, "Just take my license. Take it. You can have it. This is too much stress for me." Licensee left the agency and did not take any of the informational handouts offered to her during the interview.^[12]

12. Licensee believed that Ms. Kleinschmidt was involved solely because a negative child protection determination might negatively affect any subsequent background study of Licensee. At no time did Ms. Kleinschmidt make such a statement to Licensee.

13. By letter dated September 9, 2003, Ms. Kleinschmidt informed Licensee that she was recommending revocation of her daycare license to the Department based upon Licensee's failure to cooperate in the investigation.^[13]

14. By letter dated October 6, 2003, Ms. Wiebe informed Licensee and her husband that through her investigation she had determined that neglect did not occur and that child protective services were not needed.^[14] Ms. Wiebe did note that Licensee and her husband should reevaluate the supervision of Z.S. She also informed them that child protection criteria is different from daycare licensing criteria and that Ms. Kleinschmidt would pursue action on the daycare license regardless of the outcome of the child protection assessment.^[15]

15. On November 5, 2003, the Department issued Licensee an Order of Revocation, citing Licensee and her husband's interference in the interviewing of the minor members of the household.^[16] The letter informed her of her right to appeal and her right to a contested case hearing.

16. Licensee appealed the revocation of her license by letter dated November 12, 2003, and informed the Department that she was in contact with an attorney. The Department acknowledged the receipt of Licensee's appeal papers on November 25, 2003.^[17]

17. The Department issued a Notice of and Order for Hearing dated November 24, 2003, setting the hearing to take place on January 16, 2004.^[18]

18. On November 26, 2003, Ms. Kleinschmidt visited Licensee during daycare hours to discuss items on a correction order. Licensee was busy with her daycare and unable to talk with Ms. Kleinschmidt at that moment. As a consequence, Ms. Kleinschmidt left the corrections orders with Licensee and returned on December 9, 2003, to discuss them. On both occasions, Licensee was cooperative.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Minn. Stat. § 245A.07, subd. 1, requires the Commissioner to consider "the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights" of those persons in a licensee's program before applying sanctions under Minn. Stat. § 245A.07.

4. Minn. Stat. § 245A.07, subd. 3, allows the Commissioner to suspend or revoke a license, or impose a fine if a license holder fails to comply with the applicable laws or rules, or knowingly withholds relevant information from or gives false or misleading information to the commissioner . . . during an investigation. Similarly, Minn. R. 9545.0020 makes failure, inability, or refusal to comply with the applicable rules cause for revocation of a license.

5. Before suspending, revoking, or making conditional a license, Minn. Stat. § 245A.04, subd. 6, requires the Commissioner to consider the facts, conditions, and circumstances concerning the program's operation and the well-being of persons served by the program. It also requires a risk of harm analysis to be performed on the results of any statutorily required background study.

6. During the hearing, the Administrative Law Judge refused to receive two correction orders (Exhibits 8 and 9), finding the two documents irrelevant to whether Licensee and her husband interfered in DCSS's attempts to interview I.S. and Z.S. After an analysis of the relevant statutes, Exhibits 8 and 9 will be received into the record for the limited purpose of considering the facts, conditions, and circumstances concerning the program's operation and the well-being of persons served by the program under Minn. Stat. § 245A.04, subd. 6. The two correction orders will not be used in any risk of harm determination under the statute since Licensee's background study is not at issue and did not give rise to the issue in this matter.

7. Minn. Stat. § 245A.04, subd. 5 states:

When the commissioner is exercising the powers conferred by this chapter, the commissioner must be given access to the physical plant and grounds where the program is provided . . . , persons served by the program, and staff whenever the program is in operation and the information is relevant to inspections or investigations conducted by the commissioner. The commissioner must be given access without prior notice and as often as the commissioner considers necessary if the commissioner is conducting an investigation of allegations of maltreatment or other violation of applicable laws or rules. . . . Persons served by the program have the right to refuse to consent to be interviewed, photographed, or audio or videotaped. Failure or refusal of an applicant or license holder to fully comply with this subdivision is reasonable cause for the commissioner to . . . immediately suspend or revoke the license.

8. Access includes, in relevant part, admission into the residence used by the daycare children, any adjoining land or building owned by the provider and used in the provision of daycare services, and noninterference in interviewing all caregivers and household members present on a regular basis or during the hours of operation.^[19]

9. The burden of proof first lies with the Commissioner, who may demonstrate reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that the licensee failed to comply fully with applicable law or rule. If the Commissioner demonstrates that reasonable cause

existed, the burden shifts to the licensee to demonstrate by a preponderance of the evidence that she was in full compliance with those laws or rules allegedly violated, at the time that the Commissioner alleges the violations occurred.^[20]

10. The Department presented the testimony of Ms. Kleinschmidt and Ms. Wiebe as proof that Licensee failed to comply fully with applicable law and rule when she and her husband refused the two workers further access to I.S. and Z.S. Furthermore, Licensee's testimony, while tempered by her misunderstanding of Ms. Kleinschmidt's role in the investigation, even confirmed the violation.

11. The preponderance of the evidence shows that Licensee reasonably understood that she had to allow daycare licensing workers access to household members in an investigation to ensure compliance with the law and rules.

12. The attached Memorandum is incorporated by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner take appropriate disciplinary action based upon the totality of the circumstances.

Dated: February 19, 2004

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape recorded (3 tapes). No transcript prepared.

MEMORANDUM

The evidence shows that Licensee and her husband interfered in the interviewing of I.S. and Z.S. On August 26, 2003, Licensee's husband interrupted and stopped the interview of Z.S. and prevented any communication between the workers and I.S. On August 29, 2003, Licensee and her husband called the workers and granted them permission to interview I.S., but refused to allow any further communication with Z.S. This interference is a violation of Minn. R. 9502.0335, subp. 13.

Ms. Wiebe and Ms. Kleinschmidt made it clear to Licensee, beginning August 26, 2003, that they were investigating reports made against both Licensee's children and her daycare children. Z.S. is in both categories due to his age, and Licensee was aware of that fact. Ms. Wiebe and Ms. Kleinschmidt were jointly involved in the investigation in an effort to determine whether the two reports implicated both child protection and daycare licensing, or just child protection. The workers needed access to I.S. and Z.S. as one step in making that clarification. Ms. Wiebe did eventually interview both children under Minn. Stat. § 626.556, but Ms. Kleinschmidt did not have jurisdiction to participate in those interviews. Despite the fact that Ms. Wiebe did not substantiate the two reports of neglect, Licensee and her husband still interfered with the workers' access to I.S. and Z.S. The safety of the children could have been jeopardized by the repeated delays in the investigation.^[21]

In Licensee's defense, she did allow Ms. Wiebe and Ms. Kleinschmidt to begin interviewing Z.S. on August 26, 2003, and did make I.S. available on that date until her husband made it necessary for the workers to leave the property. Licensee felt conflicted about how to handle the situation and became emotional and stressed out. Her husband's demeanor and behavior did not help the circumstances, and likely only served to put Licensee under more stress.

The situation arose over a misunderstanding as to the applicability of certain rules to the circumstances. Given the facts of the matter, revocation may be too harsh a penalty to impose upon Licensee.

S.M.M.

^[1] Licensee has a class C-3 license, meaning she and one other adult may care for up to 14 children, or Licensee may care for up to 12 children on her own. Minn. R. 9502.0367.

^[2] Testimony of Licensee.

^[3] Minn. R. parts 9502.0315, subp. 18 and 9502.0365, subp. 1.A.

^[4] Ex. 1.

^[5] Ex. 2.

^[6] Ex. 2.

^[7] Ex. 2.

^[8] Licensee was home with Z.S. and her daycare children. Licensee's husband and I.S. were not at home when the two workers arrived.

^[9] Ms. Kleinschmidt noticed a few other potential indoor health and safety issues, but did not address them at that time.

^[10] Ex. 2.

^[11] Minn. Stat. § 626.556, subd. 10(c) allows a child protection worker to interview an alleged child victim without the consent of the parents. Ms. Kleinschmidt was not present during the interview due to a lack of jurisdiction.

^[12] The handouts dealt with privacy rights, high-lighted portions of the daycare rules, the Licensing Act, wading pool best practices and swimming pool guidelines.

^[13] Ex. 3.

^[14] Ex. 4.

^[15] Ms. Kleinschmidt sent this letter to the Department on October 9, 2003. Ex. 4.

^[16] Ex. 5.

^[17] Ex. 6.

^[18] Ex. 7.

^[19] Minn. R. 9502.0335, subp. 13.

^[20] Minn. Stat. § 245A.08, subd. 3(a).

^[21] Licensee and her husband also denied the two workers access to the home and the garage, thereby preventing Ms. Kleinschmidt from following up on the clutter issues she noticed on August 26, 2003. These issues were later addressed in the correction orders. Exs. 8 and 9.